A	B
The A portion of the line represents that portion of the river which is used or suitable for use in the transportation of persons or property in interstate commerce.	The B portion of the line represents that portion of the river not so used or suitable for use.

The A portion of the line represents a navigable water as defined in Section 3 (8) of the Federal Power Act, 16 U.S.C.A. § 796 (8). We quote the applicable language:

> "(8) 'navigable waters' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce * * * *and which* * * * *are used or suitable for use* for the transportation of persons or property in interstate or foreign commerce, * * *." [Italics supplied]

The B portion is that portion of a stream which in Section 23 (b) of the Act is not "navigable waters" as defined in the Act, because not so used or suitable for use, but nonetheless is water over which Congress has jurisdiction.

Section 23 (b) of the Act provides in part as follows:

> "* * * Any person, * * * intending to construct a dam * * * in any stream or part thereof, *other* than those defined herein as navigable waters, [that is waters which are used or suitable for use] *and over which Congress has jurisdiction* under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected * * * such person, * * *

> shall not construct, maintain, or operate such dam * * * until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, * * * permission is hereby granted to construct such dam * * * in such stream upon compliance with State laws." [Italics supplied.] (16 U.S.C.A. § 817)

If a dam is built in portion A of the stream, an application for a license from the Commission is required (except in the case of a permit given pursuant to law prior to the enactment of the Federal Power Act).

In case a dam is built in portion B of the stream, then if the Commission finds that the interests of interstate commerce are not affected by the dam, permission is automatically granted by the Act itself. It is only when the Commission finds that the dam affects the interests of interstate commerce that a license must be secured from the Commission.

It is obvious from the decision of the Circuit Court of Appeals that the court was of the opinion that the term "navigable waters" as defined by the Federal Power Act was synonymous with "navigable waters of the United States" as previously defined by the courts, as it said:

> "The principal question is whether the Wisconsin River is a navigable river of the United States.
>
> * * *
>
> "* * * In the Act, Congress defined 'navigable waters' as those parts of streams or other bodies of water 'which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce,' § 3 (8), 16 U.S.C.A. § 796 (8). *However, long*

> *before the passage of the Federal Power Act, courts had occasion to define what were 'navigable waters' of the United States."* [Italics supplied]

Then followed the reference to the definition in *The Daniel Ball,* 77 U. S. 557, 563, of the term "navigable waters."

That Congress intended a distinction to be made between "navigable waters of the United States" and "navigable waters" as defined in the Act is made clear by the language of Section 23 (b) of the Act to the effect that:

> "* * * Any person, * * * intending to construct a dam * * * in any stream * * * *other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce* * * * shall before such construction file declaration of such intention * * *." [Italics supplied]

To come within the meaning of that language a stream must be one over which Congress has jurisdiction under its authority to regulate commerce (that is, it must be one which, according to the court decisions, is a navigable water of the United States), but it must be one other than those defined in the Act as navigable waters.

This would necessarily make the language "other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce" apply to waters subject to the jurisdiction of Congress which are not used or suitable for use in the transportation of persons or property in interstate commerce.

The reference of the Circuit Court of Appeals to the definition by the courts of "navigable waters of the United States" is based upon *United States vs. Appalachian Power Company,*

311 U. S. 377, 408, and the Circuit Court of Appeals quoted from that decision: "When once found to be navigable, a waterway remains so," and "Even absence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers *in the constitutional sense.*" [Italics supplied.]

This court, in referring to "navigability of rivers in the constitutional sense" reaffirmed the doctrine that, once subject to the jurisdiction of the United States, a river always remains so subject, regardless of whether it is used or continues to be suitable for use in interstate or foreign commerce, but it did not determine, as the decision of the Circuit Court of Appeals seemed to think, that because a river may be navigable in a constitutional sense it is subject to the jurisdiction of the Commission regardless of whether it is so used or suitable for use.

Had the Circuit Court of Appeals construed the Federal Power Act as we contend it should be construed, namely, that navigable waters over which the United States has jurisdiction are classified in the Act as (a) those which are used or suitable for use, and (b) those which are not used or suitable for use, it would have been obliged to conclude that the Wisconsin River at Tomahawk is not used or suitable for use and therefore that no license was required from the Commission, unless the interests of interstate or foreign commerce were affected by the dam.

The opinion of the Federal Power Commission itself shows that all use of the river has long since ceased. (R. 603-5)

That the river is *not suitable* for the transportation of persons or property in interstate commerce is shown by the

record. During the time when rafting was resorted to, it was accompanied by great loss of life. At Mosinee alone over 100 lives were lost in rafting lumber over the falls. (R. 366) In some years 10 lives were lost there. At Trappe Rapids 14 persons lost their lives in one spring. (R. 362) Out of 100 lives lost at Mosinee, the record refers specifically to only 13, or one-seventh. If the specific references to drownings on account of rafting as shown in the record were multiplied by 7, the number would approach 350.

Such a record of loss of life establishes, we submit, that the river is not suitable for use. *The present stage of our civilization and economy would not tolerate use of a river under such circumstances.*

In rafting lumber down the river substantial damage resulted to the lumber by reason of being soaked by water, striking rocks, contact with the sand, and other causes. This damage amounted to as much as 25%. (R. 88, 193, 425)

In 1899 the river was described as well-nigh worn out for logging purposes. (R. 415)

Not being suitable for use, the portion of the river where Tomahawk Dam is located falls within the classification in the diagram as B, and an application for a license is necessary only if the dam there located affects the interests of interstate or foreign commerce. The question of the effect on the interests of interstate and foreign commerce will be the subject of Point III.

POINT III

The Dam Does Not Affect the Interests of Interstate or Foreign Commerce.

The Federal Power Commission found that the dam did affect the interests of interstate or foreign commerce. The

Circuit Court of Appeals did not determine whether that finding of the Commission was supported by substantial evidence. It would have been necessary for the Circuit Court of Appeals to pass on that question if it had construed the statute as making a distinction between navigable waters as defined in the Act, and navigable waters over which the United States has jurisdiction.

As pointed out in the Statement of Facts, the average flow of the river at Tomahawk over a period of 20 years was 2,020 c.f.s. The wheels of the power plant at Tomahawk Dam will use 2,000 c.f.s.

Freshets were needed both for the floating of logs and the rafting of lumber. (R. 392, 409, 89, 367) Freshets, therefore, occurred when the flow of the water was more than 2,000 feet.

It is only when the flow of the water is less than 2,000 c.f.s. that it will be necessary to hold back the flow for a certain period each day, so that for the remainder of the period 2,000 c.f.s. are available. Accordingly, waves would be created only when the flow is less than normal, or when there would be no freshets, and when the flow is less than normal, there would be neither rafting nor logging on the river, because there would be no freshets.

As pointed out on page 10 of the brief, any waves created by Tomahawk Dam would in the natural process be ironed out within 125 miles of Tomahawk, and are in fact ironed out artificially by the operation by petitioner of Alexander Dam.

Because of these facts the interests of interstate or foreign commerce could not possibly be affected by the operation of Tomahawk Dam.

WHEREFORE, your petitioner prays that the petition for a writ of certiorari be granted, and that the case be reviewed, and the judgment of the Circuit Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

J. G. HARDGROVE
BERT VANDERVELDE
FRED W. GENRICH
Counsel for Petitioner

MILLER, MACK & FAIRCHILD
Of Counsel